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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN JIMENEZ,

Defendant and Appellant.

E046927

(Super.Ct.No. RIF142791)

OPINION

APPEAL from the Superior Court of Riverside County. Byron K. McMillan, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Martin Jimenez guilty of forcible penetration with a foreign object (Pen. Code,¹ § 289, subd. (a)(1), count 2), oral copulation by force, violence, duress or menace (§ 288a, subd. (c)(2), count 3), and sexual battery (§ 243.4, subd. (e)(1), count 4).² A trial court sentenced him to a total term of three years in state prison.

On appeal, defendant argues that his trial counsel rendered him ineffective assistance of counsel (IAC) by failing to object to the prosecutor's line of questioning regarding defendant's prior misdemeanor conviction for inflicting corporal injury on his child's mother. We affirm.

FACTUAL BACKGROUND

D.H. rented a room from defendant at a residence in Moreno Valley. On April 28, 2008, H.'s niece, Jane Doe (the victim), visited H. and planned on staying with her for a few days. The victim arrived with her boyfriend, and H. introduced them to defendant. At some point that day, defendant told the victim that she smelled good, and that he wished he was younger so that she could be his girlfriend. These comments made her feel uncomfortable.

That night after the victim's boyfriend left, the victim, H., and defendant talked in the living room. H. took some medication and went to bed. Defendant and the victim

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² The jury acquitted defendant of the charge in count 1 for assault with the intent to commit rape (§ 220).

then sat on the couch and watched a movie. The victim had her feet propped up on the table. Defendant told the victim to move closer to him and told her to lie down. The victim fell asleep. When she woke up, she felt defendant touching her, so she kept her eyes shut because she was scared. Defendant had his hand under her clothes and was touching her vagina. He put his fingers inside her vagina and touched her vagina with his mouth. He also touched her breasts with his hands and asked her to sleep with him. The victim said “no” and told him to stop. Defendant tried to pull the victim’s shorts off and asked her if she wanted him to give her oral sex. She said “no” and told him to get off of her. The victim kept calling her boyfriend on her cell phone and hanging up, in an effort to get him to call her back. Once the victim’s cell phone rang, defendant stopped touching her. The victim’s boyfriend called back. She went to the bathroom to talk on the cell phone and told him to pick her up. The boyfriend came to get her. When the boyfriend arrived, the victim was sitting on the curb, crying hysterically. At first she was reluctant to tell the boyfriend what had happened, but then she told him what defendant had done to her. They knocked on H.’s window to wake her up. When H. came outside, they told her what had happened. The victim’s boyfriend called the police.

Officer Anthony Gannuscio of the Riverside County Sheriff’s Department responded to the call. When he arrived, the victim and her boyfriend were waiting in the boyfriend’s car. The victim had her face in her hands and was “crying hysterically.” The victim told Officer Gannuscio what had happened, and the officer went to defendant’s residence to talk to him. Defendant denied having any sexual contact with the victim. Officer Gannuscio arrested defendant and transported him to the police station. He read

defendant his *Miranda*³ rights, which defendant waived, and then the officer spoke with him again.⁴ Defendant initially denied having sexual contact with the victim. However, after Officer Gannuscio told defendant they could obtain DNA evidence and that “DNA doesn’t lie,” defendant admitted kissing and touching the victim. Defendant said he touched and kissed around the victim’s vaginal area, but did not penetrate her. Defendant said the entire encounter was consensual.

The victim was examined by a sexual assault nurse. The nurse testified at trial that the victim was upset and tearful during the examination. The victim told the nurse she fell asleep while watching a movie with the suspect (defendant). When she woke up, she found him kissing and touching her, and “sticking his finger in.” The nurse examined her and found redness on the victim’s vagina that was consistent with vaginal penetration with a finger.

Defendant testified on his own behalf at trial. He testified that, after H. went to bed, he and the victim sat on the couch watching a movie. The victim put her feet on the table and said she was going to sleep. Defendant leaned over on top of her, and she put her arm around him. They started kissing consensually, and defendant touched her breasts and legs. Defendant denied putting his hands under the victim’s underwear. He said the kissing stopped when the victim’s cell phone rang. Defendant testified that he initially lied to the police about kissing the victim because he did not trust them.

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ The interview was recorded and an audiotape of the interview was played for the jury.

ANALYSIS

Defendant's IAC Claim Fails

Defendant argues that he received IAC when his attorney failed to object to the prosecutor's questioning about a prior misdemeanor conviction for domestic violence. (§ 273.5, subd. (a).) He contends such evidence of his prior conviction was inadmissible. Defendant's IAC claim fails.

A. Defendant's IAC Claim Needs to Be Brought by Writ of Habeas Corpus

At the outset, we note that defendant has improperly raised his IAC claim on appeal. The Supreme Court has “repeatedly stressed ‘that “[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citations.]” A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Here, the evaluation of defense counsel's decisions and tactics would require consideration of matters outside the appellate record. Accordingly, the issues must be adjudicated by means of petition for writ of habeas corpus.

Nonetheless, defendant's IAC claim is without merit.

B. Standard of Review

To prevail on the claim of IAC, defendant must demonstrate both that his attorney failed to act in the manner expected of a reasonably competent advocate and that it is reasonably probable that a more favorable determination would have been made in the

absence of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.) A failure on either showing will result in rejection of the claim. (*In re Cox, supra*, at pp. 1019-1020.)

C. Relevant Background

During cross-examination, the prosecutor asked defendant questions regarding what defendant had told the police about the encounter between him and the victim. Defendant admitted that he lied to the police in multiple interviews, and only after the officer told defendant they could obtain DNA evidence, did defendant admit having sexual contact with her. The prosecutor then asked defendant if he had "previously had some issues with domestic violence." Defendant said, "Yes." Defendant confirmed that the prior incident involved his son's mother, when she came for a child custody exchange. The following questioning then took place:

"Q. And you got the child from her, put the child down and attacked her; is that fair to say?

"A. No.

"Q. Well, did you plead guilty to that charge?

"A. Yes, I did because they wouldn't let me out unless I plead [*sic*] guilty.

"Q. You weren't guilty. You just plead [*sic*] guilty?

"A. I was not guilty.

"Q. You are then going to deny you wrapped your left arm around [her] neck, placed her in a headlock in front of other children who screamed; is that right?

"A. It's not true. She—

“Q. Let me back up and break it down. You are saying that didn’t happen; is that right?

“A. That’s right.

“Q. She just made it up?

“A. She was mad at that time.

“Q. You are saying this [current incident] didn’t happen. [The victim] just made this whole thing up?

“A. Yes.

“Q. Not the whole thing, right, because—

“A. Not the whole thing.”

During her rebuttal argument at closing, the prosecutor stated:

“We are supposed to believe the defendant, who has the most motive to lie in this case, who is a proven liar not only to the police in this case but about his previous case. He said he was convicted because the other lady lied. All these women in his life that [*sic*] are lying, right?”

D. Defendant’s IAC Claim Fails

Defendant first argues that his trial counsel’s representation was deficient in that counsel should have objected to the prosecutor’s line of questioning regarding defendant’s prior misdemeanor conviction. Defendant asserts that evidence of a misdemeanor conviction is inadmissible hearsay when offered to impeach a witness’s credibility. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297-299, superseded by statute on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1461.) At

the outset, we note that ““deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.’ [Citations.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) Moreover, here there was a conceivable tactical reason for not objecting to the prosecutor’s line of questioning. Although misdemeanor *convictions* themselves are not admissible for impeachment, “evidence of the underlying *conduct* may be admissible subject to the court’s exercise of discretion. [Citation.]” (*People v. Chatman* (2006) 38 Cal.4th 344, 373.) The prosecutor did not actually ask about defendant’s misdemeanor *conviction*. The record shows that the prosecutor asked defendant if he had previously “had some issues with domestic violence.” The prosecutor proceeded to ask defendant questions regarding the underlying conduct, and when defendant denied attacking his son’s mother, the prosecutor asked if he pled guilty to the charge. When defendant continued to deny that he attacked his son’s mother, the prosecutor ended the discussion of the issue by asking defendant if the woman had just made up the story about the attack. In view of this record, we conclude that defense counsel could have easily determined there was nothing objectionable about the prosecutor’s line of questioning.

Even if trial counsel erred in failing to object, the admission of the evidence regarding defendant’s prior misdemeanor conviction did not prejudice defendant. There was substantial evidence to support his convictions. The trial came down to a credibility contest between the victim and defendant. The victim gave detailed testimony that defendant put his fingers inside her vagina and touched her vagina with his mouth, touched her breasts, and asked her to sleep with him. The victim said no and told him to

stop. Her testimony was corroborated by testimony of the victim's boyfriend, who observed her crying hysterically after the incident. He testified that the victim told him what defendant had done to her, and that he then called the police. Officer Anthony Gannuscio similarly testified that when he arrived, the victim had her face in her hands and was crying hysterically. Officer Gannuscio testified that the victim told him what had happened on that night. She later recounted the incident consistently in a recorded interview with him. Furthermore, the sexual assault nurse who examined the victim after the incident testified that the victim was upset and tearful during the examination. The nurse's testimony about the incident was similar to the other testimonies. In addition, the nurse testified that she found redness on the victim's vagina, which was consistent with vaginal penetration with a finger. By contrast, the evidence showed that defendant initially denied having any sexual contact with the victim and claimed the victim made up the whole story. At the beginning of a subsequent interview at the police station, defendant again denied any sexual conduct. He admitted having sexual contact with the victim only after the officer told him they could obtain DNA evidence. Defendant admitted at trial that he lied to the police. Thus, the jury had every reason not to believe defendant's testimony that the sexual contact between him and the victim was consensual.

Defendant cannot show a reasonable probability that a more favorable determination would have been made in the absence of his counsel's failure to object. Therefore, his IAC claim fails.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.